

REDACTED PURSUANT TO PROTECTIVE ORDER
AVAILABLE FOR PUBLIC INSPECTION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)

Flat Wireless, LLC for and on behalf)
of its Operating Subsidiaries,)

Complainant,)

v.)

Cellco Partnership dba Verizon Wireless)
and its Operating Subsidiaries,)

Defendant.)

EB Docket No. 15-147
File No. EB-15-MD-005

INITIAL BRIEF OF FLAT WIRELESS, LLC

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SUMMARY

This Initial Brief of Flat Wireless, LLC describes the parties, summarizes the history of their negotiations, and sets forth their best and final offers, which were rejected. It then lays out the legal framework for the FCC's evaluation of the complaint, including the relevant statutory obligations to provide just and reasonable rates and not unreasonably discriminatory rates for Title II services, and the patent unlawfulness of the temporarily prevailing "commercially reasonable" standard for data roaming rates. The relevance of costs to the reasonableness analysis is discussed. The unlawfulness of rates that unreasonably restrain trade is underscored.

The brief then presents proposed factual findings regarding the current state of competition in the wireless marketplace and the unique and irreplaceable importance of Verizon as a roaming partner with reasonable rates. The reasonableness of Verizon's roaming rate offer to Flat is then compared against the rates offered to retail customers and MVNOs for the same bundles of services, suggested by the *T-Mobile Order*.¹ The Verizon offer is also compared against an independent analysis of the costs of producing a gigabyte of data as a surrogate for cost data from Verizon. In each case, Verizon's offered rate is grossly in excess of the relevant benchmark.

The offered rate is then compared against the rates Verizon offers to other wireless carriers for similar services. Since the rate offered to Flat is higher than the rate offered to other carriers without any justification for the difference, the rate is presumptively unreasonably discriminatory. Flat is entitled to the lower rate.

The brief then addresses the criteria cited in the *Data Roaming Order* for evaluating the commercial reasonableness of rates. That evaluation leads to a clear finding that Verizon's data roaming rates are unreasonable.

Finally, the effect of Verizon's pricing practices in restraining trade is analyzed.

¹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Letter Ruling, WT Docket 05-265, Released December 18, 2014 ("*T-Mobile Order*").

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INITIAL BRIEF OF FLAT WIRELESS, INC.

This Initial Brief is submitted in support of Flat Wireless, LLC's ("Flat's")
Complaint in the above captioned proceeding.

I. Background

A. The Parties

1. Complainant Flat is a Texas limited liability company headquartered at 5225 S Loop 289, Suite 128, Lubbock, TX 79424. Flat's phone number is (806) 589-0670. Its operating subsidiary, Flat West Wireless, LLC, is a Texas limited liability company headquartered at the same address and phone number. Flat holds licenses to provide CMRS service in Texas, California, New Mexico, and Arizona. In order to offer a comprehensive, competitive and attractive mobile communications service to its customers in the limited areas where it offers or will offer its own facilities-based service,

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Flat must have access to just and reasonable roaming rates from roaming partners. In particular, a reasonable roaming rate from Defendant is essential.

Defendant Cellco Partnership, a Delaware general partnership, and its operating subsidiaries do business under the name Verizon Wireless (“Verizon”). Verizon has been recognized by the Commission as a nationwide provider of mobile communications services. *Policies Regarding Mobile Spectrum Holdings*, 30 FCC Rcd 8635 (2015). It advertises and provides wireless service across a substantial portion of the populated areas of the continental United States. It regularly touts the superiority of its coverage national area over other carriers, including rival CDMA carrier Sprint. It is by far the largest provider of wireless service using the CDMA interface, which is the interface used by Flat.

B. Current and Proposed Roaming Terms

Flat, on behalf of itself and its subsidiaries, currently has a roaming agreement with Verizon that dates back to June, 2011. The agreement specifies a roaming rate that is [REDACTED] (Current Roaming Agreement at Exhibit A to Flat Complaint.) These rates are grossly out of line with current roaming rates between carriers who lack Verizon’s market dominance, which are [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]² Verizon’s roaming rate to Flat is so high as to make it financially impossible for any Flat customer to roam on Verizon automatically, because the cost to Flat would

² See, Beierschmitt Declaration attached to Complaint (“Beierschmitt Complaint Declaration”), p. 4.

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be so excessive. At the same time, Flat must compete directly against [REDACTED]
[REDACTED]
[REDACTED]

Accordingly, in the winter of 2014, Flat initiated negotiation of a new roaming agreement with Verizon. The parties were never able to come close to a negotiated agreement. On September 16, 2016, the parties exchanged best and final offers of:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Neither party's proffered terms were accepted by the other.

II. Framework for FCC Decision

A. Voice Roaming

Before assessing the lawfulness of the rates offered by Verizon, we must first lay out the regulatory framework for judging such rates. The Commission has formally declared voice roaming to be a common carrier service covered by the full panoply of rights and obligations that apply to telecom service offerings under the Communications Act, including Sections 201, 202, 203 and 208. *Interconnection and Resale Obligations, Second Report and Order*, 11 FCC Rcd 9462 at ¶ 10 (1996). "When a reasonable request is made by a technologically compatible CMRS carrier, a host CMRS carrier is obligated under Sections 332(c)(1)(B) and 201(a) to provide automatic roaming on a just,

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reasonable, and non-discriminatory basis to the requesting carrier outside of the requesting carrier's home market."³

Just and reasonable rates. Section 201 of the Communications Act establishes the just and reasonable rate obligation:

All charges, practices, classifications, and regulations for and in connection with such communications service [offered by a common carrier], shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust and unreasonable is hereby declared to be unlawful.

The justness and reasonableness of voice rates must be evaluated in the light of eighty years of Commission precedent. Those precedents have consistently used the cost of providing a given service, plus a reasonable rate of return, as the guiding benchmark. *See, e.g., General Commc'ns, Inc. v. Alascom, Inc.*, 64 RR 2d 1137, 1140, 1144 (1988) ("The Communications Act does not specify a particular method for carriers to use to establish just, reasonable and non-discriminatory charges that do not create any undue preference... These statutory provisions have, however, been interpreted to require generally that carriers establish rates that are cost-related.")⁴

³ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007) at 15826 ¶ 23.

⁴ Cost is, and always has been, a core component of determining what is a just and reasonable rate. *See, e.g., In the Matter of Rates for Interstate Inmate Calling Services (ICS II)*, 28 FCC Rcd 15927, 15928 at ¶ 3 (2013) (noting that "To be just and reasonable [under Section 201], rates must be related to the cost of providing service."); *In the Matter of Rates for Interstate Inmate Calling Services (ICS I)*, 2013 FCC Lexis 4028 at ¶ 45 (2013) (noting that "the just and reasonable rates required by Sections 201 and 202...must ordinarily be cost-based"); *In the Matter of Petition of ACS of Anchorage*, 22 FCC Rcd. 16304, 16330 n. 155 (2007) (noting that "If ACS's rates are challenged, it may be necessary for the Commission to consider its costs and earnings in assessing the reasonableness of its rates."); *Application by Verizon New England*, 17 FCC Rcd 7625, 7632 at ¶ 13 (2002) ("determination of the just and reasonable rates for network elements

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Verizon has argued that the Commission has, *sub silentio*, abandoned these 80 years of governing case law in assessing roaming rates, but it cites not a single authority to support that perverse proposition.⁵ To be sure, the FCC has avoided imposing industry-wide “price caps” on roaming rates and has eschewed “prescribing” rates,⁶ but it has consistently invited carriers who are aggrieved by roaming rates to file a complaint under Section 208 and get a ruling.⁷

Here, the Market Disputes Resolution Division has rejected motions made by a similarly situated complainant, NTCH, Inc. in its formal complaint proceeding,⁸ to discover Verizon’s actual costs in order to conduct the required reasonableness

shall be based on the cost of providing the network elements, shall be nondiscriminatory, and may include a reasonable profit.”); *Commc’ns, Inc. v. Alascom, Inc.*, 64 RR 2d 1137, 1140, 1144 (1988); *In re Investigation of Special Access Tariffs*, 4 FCC Rcd. 4797, 4800 ¶ 32 (1988) (noting that, under Section 201 of the Act, “[c]osts are traditionally and naturally a benchmark for evaluating the reasonableness of rates”); *In the Matter of MTS and WATS*, 97 F.C.C. 2d 682, 687 ¶ 10 (1995) (“Preeminent among these principles is the conclusion that actual costs of providing service underlie the statutory requirement that rates be just, reasonable, and nondiscriminatory.”) (internal quotations omitted).

⁵ Verizon Answer Legal Analysis, p. 3-7.

⁶ The Commission did indicate in 2007 that the “better course” is that the “rates individual carriers pay for automatic roaming services be determined in the marketplace through negotiations between the carriers, subject to the statutory requirement that any rates charged be reasonable and non-discriminatory.” *Reexamination of Roaming Obligations of CMRS Providers and Other Providers of Mobile Data Services*, 22 FCC Rcd 15817, 15833 (2007) (emphasis added). Thus, while the Commission has enunciated its preference for negotiation over *ex ante* rate regulation, it has never renounced the fundamental obligation that rates be just and reasonable as required by Section 201 of the Act.

⁷ See, e.g., *Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, ¶ 210 (1994).

⁸ *NTCH, Inc. v. Cellco Partnership d/b/a Verizon Wireless*, EB Docket No. 14-212 (“NTCH Complaint”). *Order, NTCH, Inc. v. Cellco Partnership d/b/a Verizon Wireless*, DA 16-734 (Released June 30, 2016) (“NTCH Order”) (on appeal, *NTCH, Inc. v. FCC*, Court of Appeals for the D.C. Circuit, Case No. 16-1277). Verizon and Flat have agreed to incorporate the relevant discovery questions from the NTCH Complaint, including this one. (Notice of Formal Complaint, Enforcement Bureau, July 15, 2015).

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assessment.⁹ However, it did so solely on the basis of *Reexamination of Roaming Obligations of CMRS Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd 4181 (2010) (*Automatic Roaming Order*). That order deals exclusively with the circumstances of when a carrier must offer automatic roaming to another carrier. It does not address at all the justness or reasonableness of the rates offered. It is therefore no surprise that the Commission did not identify carrier costs as one of the items that would be considered, as they are wholly inapplicable in that context. But the provision of automatic roaming has nothing to do with the relevance of costs in the context of establishing just and reasonable rates. There is no reason why the justness and reasonableness of a CMRS carrier's roaming rates should be evaluated differently from any other common carrier's rates.

In the absence of actual cost data, Flat will of necessity rely on proxies for cost data – retail rates and MVNO rates – which the Wireless Bureau has declared in the context of data roaming are valid bases for assessment of commercial reasonableness,¹⁰ and generic data calculating the cost of delivering a GB of data.

Verizon has also argued that the proper measure of reasonableness is the rate it is charging, or being charged by, other carriers for roaming.¹¹ This is a false measure. As is demonstrated below, Verizon so dominates the CDMA market that it has what amounts to monopoly power to charge any rate it wishes. It has the widest coverage nationwide of any other CDMA carrier, which means that it has the least need to enter into roaming

⁹ That order is under interlocutory review and has been incorporated into the instant proceeding by agreement of the parties (Notice of Formal Complaint, Enforcement Bureau, July 15, 2015).

¹⁰ *T-Mobile Order*.

¹¹ Verizon Answer Legal Analysis, p. 3.

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agreements with other carriers. In those few cases where it actually needs a roaming agreement with other carriers, that commercial reality tempers its normal high rates. Simply stated, the fact that Verizon has the economic power to, and does, consistently gouge carriers across the board does not logically establish the reasonableness of its rates; it just establishes that these rates are *consistently* unreasonable when weighed against correct standard: cost-plus-reasonable-return.

Not unreasonably discriminatory rates. The statutory obligation to offer non-discriminatory rates is found in Section 202 of the Act:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for, or in connection with, communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality....

A rate or term is unjustly or unreasonably discriminatory when it differs from a rate offered to another customer or carrier without a valid basis for the distinction.¹²

Here, we need only review the rates [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹² *Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers*, 13 FCC Rcd 16857 at 14 (1998); *In the Matter of Competition in the Interstate Interexchange Marketplace*, 5 FCC Rcd 2627 at 137 (1990); *In the Matter of AT&T Communications*, 103 FCC 2d 157 at 15 (1985).

¹³ These discovery responses, provided by Verizon in the NTCH Complaint, were incorporated into the instant record by agreement of the parties (Notice of Formal Complaint, Enforcement Bureau, July 15, 2015).

[REDACTED] This is textbook rate discrimination.

Verizon has offered no factual explanation whatsoever in this record for how or why the rate offered to one carrier should be different from the rate offered to another, other than [REDACTED]. Nor has it explained why MVNOs, who are offered services functionally indistinguishable from the roaming services offered to Flat, should receive [REDACTED] rate. Since the burden is always on the carrier to justify the reasonableness of discriminatory pricing,¹⁴ and Verizon has not even attempted to meet that burden, little analysis is required here to make finding of unlawful discrimination, especially when, as discussed below, Flat's analysis indicates that Verizon likely is using these roaming rates for its competitive advantage.

B. Data Roaming

In the time immediately prior to Flat's filing of this Complaint, the Commission finally recognized the error of its previous miscategorization of data roaming, and re-categorized data roaming as a telecommunications service subject to Title II.¹⁵ However, the Commission went on to forbear from application of Sections 201 and 202 of the Act to data roaming, applying the same standards to data roaming under the *new* regulatory paradigm as it had previously applied to such roaming when it was not a Title II

¹⁴ See, e.g. *MCI Telecom. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990) ("the carrier offering [the discriminatory prices] has the burden of justifying the price disparity as reasonable"); *In the Matter of William G. Bowles v. United Telephone Company of Missouri*, 12 FCC Rcd 9840, 9852 (1997) ("Once the like services and discrimination are established, the burden shifts to the defendant carrier to show that the discrimination is not unreasonable.").

¹⁵ *Report and Order on Remand, Declaratory Ruling, and Order*, FCC 15-24, rel. March 12, 2015 ("Net Neutrality Order").

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service.¹⁶ Because Section 332(c) of the Act explicitly bars the Commission from forbearing from Sections 201 and 202 of the Act as they apply to CMRS providers, the Commission's forbearance action was plainly and incontrovertibly unlawful. Flat and other similarly situated carriers have filed a Petition for Reconsideration of the *Net Neutrality Order* challenging this ruling¹⁷ and is confident that the ruling will be reversed. In the meantime, the Division can hardly continue to apply a facially unlawful policy. Flat is legally entitled to Title II evaluation of the justness and reasonableness of Verizon's data roaming rates, and the Division cannot but decide this case on that basis. To do otherwise simply kicks the can down the road and would inevitably require reversal.

The *Data Roaming Order* adopted in 2011¹⁸ declared that data roaming rates must be "commercially reasonable" but need not be non-discriminatory. For purposes of this Brief, Flat will demonstrate that Verizon's offered data roaming rates are neither reasonable *nor* commercially reasonable (to the extent there is a difference) and are also unreasonably discriminatory. The *Data Roaming Order* set forth a non-exhaustive list of factors to use in assessing commercial reasonableness which will be applied here, in addition to the further guidance found in the *T-Mobile Order* regarding the relevance of retail and wholesale roaming rates in assessing commercial reasonableness.

Restraint of trade. The Commission explicitly indicated in the *Data Roaming Order* that "conduct that unreasonably restrains trade, however, is not commercially

¹⁶ *Id.* at ¶¶ 523-526.

¹⁷ *Petition for Reconsideration of NTCH, Inc. et al.*, GN Docket 14-28, May 13, 2015.

¹⁸ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411 (2011) (*Data Roaming Order*).

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reasonable.”¹⁹ Competition in the marketplace is restrained by Verizon selling access to its network at unreasonably high prices in submarkets (such as the roaming market) where it has dominant market power in order to gain or solidify market dominance in other markets where it is subject to fierce competition. This is illegal under the Sherman Act.²⁰ In addition, to the extent that Verizon is selling access to its networks to MVNO carriers at low prices with the intent of undercutting the ability of other competitors to remain in business and compete, then it is engaging in highly illegal conduct known as “predatory pricing.”²¹ Flat will show that the roaming rates charged by Verizon have a direct adverse effect on competition that constitutes an unreasonable restraint of trade in several respects and is therefore unlawful.

III. Proposed Findings of Fact

A. Access to Verizon’s Network Is Necessary to Permit Ubiquitous CDMA Roaming.

The Commission made the provision of roaming services between cellular carriers mandatory from the very inception of the cellular service. The nationwide cellular system has always envisioned and required cellular service to be ubiquitous and available to subscribers roaming outside their home service areas. *An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, CC Docket No. 79-318, Report and Order, 86 FCC 2d 469 at ¶ 75 (1981). At that time, the

¹⁹ *Data Roaming Order* at ¶ 85.

²⁰ 15 U.S.C. § 2. See also, *Virgin Airways Ltd. v. British Airways PLC*, 257 F. 3d 256 (2d. Cir. 2001); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

²¹ See *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act*, U.S. Department of Justice, 2008, Chapter 4 “Price Predation.” see also, *Brooke Group*, 509 U.S. 209 (1993).

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cellular marketplace was expected to be characterized by broad diffusion of ownership among the various Regional Bell Operating Companies and independent telephone companies on the one hand, and dozens – later hundreds – of non-wireline providers on the other. Because of the diffusion of ownership and the fact that no carrier could offer service directly to its own customers in the large parts of the country that were outside its own licensed territory, it was in the interest of all carriers to have mutually agreeable and reciprocal roaming arrangements that would permit their customers to roam when they were not in their home markets.

This diversity of cellular ownership is no longer the case. Most of the small local or regional carriers have been swallowed by AT&T and Verizon. MetroPCS and Cricket, which until recently provided viable CDMA roaming options in some major markets, gave up as independent operators and merged with T-Mobile and AT&T, respectively. Both are in the process of converting their networks from CDMA to GSM. In addition, Allied has been sold to AT&T. After a brief transition period, its CDMA network will also be converted to GSM.

Carriers like Flat, which are also CDMA-based, must, of practical necessity, have roaming agreements with Verizon. Verizon's national footprint far exceeds that of any other CDMA carrier, which means that in many parts of the country there is no realistic alternative to Verizon as a roaming partner for Flat's customers. With the loss of Cricket, Allied, and MetroPCS, the customers of the remaining CDMA carriers are left with only one viable national roaming option: Verizon and Sprint. But Sprint is not an option at all over most of the rural areas where Flat's customers roam.

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Sprint's network is not nearly as broad or as deep as Verizon's. Sprint's network, though ostensibly national in scope, covers only about half the land area of the Verizon's network. (A copy of Verizon's self-publicized network coverage area was provided by Flat as Exhibit B to its Complaint.) Specifically, page 115 of the *2016 Competition Report*,²² which shows Verizon Wireless having 2,352,611 sq. miles of actual coverage nationwide, compared to 1,009,097 sq. miles for Sprint. Sprint thus offers less than half as much coverage as Verizon, by the Commission's own finding. In Flat's Texas market, for example, Sprint's coverage is *less* far-reaching than Flat's own coverage area, so it can provide no assistance to customers who need to roam outside Flat's home coverage area. In Texas, calls originating on Sprint's network are often dropped when a customer needs to roam on that network, and often the call cannot then be easily re-initiated.²³

Because of the enormity and ubiquity of Verizon's spectrum holdings, the lack of viable alternatives, and its limited need to roam with other carriers on account of its own nationwide footprint, Verizon dominates the CDMA roaming market. It has every incentive to make its smaller competitors less attractive to customers by reducing those customers' ability to roam if they do not sign on as Verizon customers. Were it not for Section 20.12 of the Commission's rules requiring it to provide roaming, Verizon would have no reason to enter into most of its roaming agreements at all and presumably would ordinarily not do so. An exception to this rule covers the roaming agreements VZW has with [REDACTED]

[REDACTED]

²² 19th Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, DA 16-1061, re. September 23, 2016, WC Docket 16-137 ("*2016 Competition Report*").

²³ Beierschmitt Complaint Declaration, p. 2.

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[REDACTED]

[REDACTED]

[REDACTED]²⁴

The lack of access to roaming on just and reasonable terms puts Verizon's competitors at a significant competitive disadvantage because they cannot offer the ubiquitous wireless service that Verizon can offer based on its nationwide footprint. Verizon's refusal to offer just and reasonable roaming rates contributes to and exacerbates the market dominance that Verizon already enjoys and prevents the emergence of competition using CDMA technology against the four nationwide carriers.

The Commission recognized four years ago that Verizon has a dominant position in the mobile communications marketplace.²⁵ The Commission found that, as of the summer of 2012, Verizon would have an average of 107.5 MHz of spectrum nationwide, outstripping its other national competitors by a wide margin.²⁶ The Commission determined that this level of spectrum aggregation caused significant competitive concerns. The Commission also observed at the time that the "transfer of AWS-1 spectrum to Verizon Wireless would place it in the hands of a nationwide provider that has little incentive to provide the roaming capability necessary for competitors with less than national footprints."²⁷ Since 2012, Verizon has acquired more spectrum and has

²⁴ Exhibit A to Verizon's Response to Interrogatories.

²⁵ *In the Matter of Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses, Memorandum Opinion and Order and Declaratory Ruling, FCC 12-95, rel. August 23, 2012. ("SpectrumCo Order").*

²⁶ *Id.* ¶ 77.

²⁷ *Id.* ¶ 84.

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fewer competitors, so the market is even less competitive and there is even less of an incentive for Verizon to provide reasonable roaming rates to its competition.

Most recently, the Commission issued its *2016 Competition Report*. There the Commission once again avoided the statutory directive to deliver a complete analysis of whether or not there is effective competition in the CMRS marketplace. Such an analysis would normally have reached a conclusion with respect to the matter under review, but the Commission failed to articulate any such conclusion. Nevertheless, the Commission pointedly refused to declare the CMRS market competitive, and, from the facts presented in the report, it is clear that the CMRS market is positively non-competitive in many regions of the United States.

A. Unjustness and Unreasonableness of Rates

There are several measuring sticks by which we can assess the reasonableness of Verizon's voice and roaming rates. We can (i) compare them to Verizon's retail rates, (ii) we can compare them against Verizon's wholesale (MVNO) rates, and (iii) we can compare them against Verizon's costs, to the extent that we are able to project costs in the absence of Verizon's internal cost information.

We note as a preface that the Commission's *T-Mobile Order* specifically was intended to provide guidance as to how to evaluate the commercial reasonableness of data roaming rates:

Verizon and AT&T assert that it is not appropriate to base data roaming rates on retail, MVNO, or international roaming rates because these other rates are based on markedly different factors. In this guidance, we provide only, as requested by T-Mobile, that substantial differences from these other rates are potentially relevant reference points in determining commercial reasonableness.²⁸

²⁸ *T-Mobile Order* ¶ 17 (Footnote omitted).

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Clearly, the Commission did not intend these factors to be *per se* determinative of reasonableness, but there is certainly no reason why these would not be considered relevant metrics in this case. If not relevant in this case, when would they ever be relevant? In the *NTCH Order*, the Division largely dismissed the factors cited in the *T-Mobile Order* as not being probative in a roaming rate challenge very similar to this one. But to take that approach not only ignores the most solid and reliable metrics available to establish what a reasonable rate for the service in question should be (other than Verizon's own cost information, which the Division refused to compel Verizon to produce), but also renders the *T-Mobile Order* a virtual nullity.

Curiously, while rejecting retail and MVNO rates as relevant metrics, the Division in the *NTCH Order* instead relied heavily on the roaming charges which Verizon imposes on other carriers as compelling evidence of the reasonableness of the rates offered here. There is no sound reason to prefer rates developed out of an indisputably, quasi-monopolistic dynamic to the rates that Verizon offers other parties in a truly competitive market.

1. Retail rates. Verizon offers numerous retail rate packages. In none of these packages does Verizon tell the consumer what she is being charged per minute of use or per gigabyte of data. This information is always buried in a bundle of activation fees, monthly charges, and limited or unlimited access to various service categories. We can, however, take a typical retail plan and assume the maximum usage of that plan's elements to develop a per element quarterly charge, and then compare that result against the roaming rate offered by Verizon to Flat.

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For this exercise, we selected the “Prepaid Smartphone \$45 Monthly Plan” which is set forth at pages 4 and 5 of Verizon’s Response to NTCH’s Interrogatories. We selected a Plan that offers one of the lowest priced service options for retail customers since we assumed that Verizon’s cost of service to a retail customer would always be greater than its cost of service to a roaming partner such as Flat. This plan provides the range of services being compared to the services that would be provided to Flat as a roaming partner. The plan offers a monthly prepaid rate of \$45. It includes unlimited voice, toll and SMS service (three of the service categories desired by Flat) and 1 GB of data. (1 GB is included in the basic rate and an additional 3 GBs can be purchased for \$20, and are good for up to 180 days.) There is also a onetime activation charge of \$35.00.

Since Verizon provided its roaming data in quarterly (three month) increments, we use a calendar quarter of service for comparison. Since a roaming partner would normally use a high volume of minutes, we have assumed usage of the maximum number of voice minutes possible in a quarter under the plan. Under this plan, a retail customer maximizing her use of voice minutes would pay:

Monthly access of \$45.00 x 3	\$ 135.00
Toll	\$ 0.00
SMS	\$ 0.00
129,600 voice minutes in a quarter	\$ 0.00
12 GB of data	\$ 60.00
<u>One time activation fee</u>	<u>\$ 35.00</u>
Total	\$ 230.00

Assuming based on the above that a GB of data is priced at \$5.00/GB, we can roughly attribute the remaining \$170 in quarterly charges by estimating that the volume of texts is about one-third the volume of voice minutes in a given month, per Flat’s typical customer

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use pattern.²⁹ We assign no separate price to toll charges because these charges, while real, are negligible. We therefore have 129,600 MOU and 43,200 texts for which a customer is being charged \$170 per quarter. These are then divided into \$170 to obtain the per unit price for texts and voice minutes. The result is a rate of \$0.098 per minute and per text. This rate obviously diminishes as the one-time activation rate is amortized over more quarters. This rate must include both Verizon's cost recovery and profit margin on the services delivered.

Of course, as noted above, unlike roaming rates, retail rates must cover the cost of advertising, rent on retail stores, sales personnel, customer service operations, phone subsidies, detailed billing, and other costs associated with acquiring and sustaining customers. So the rate for roaming services should be significantly *less* than the rate provided to retail customers for the same bundle of services. But it is not. Instead, at Verizon's best offered rate, Flat would have to pay this amount for the same services:

²⁹ Flat Amended Complaint at p. 14.

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[REDACTED]

[REDACTED]

The roaming rate is therefore roughly [REDACTED] higher than the comparable retail rate. There is no conceivable justification for this difference in rates for the same services. Since the Commission has indicated in the data context that retail rates are a good metric for the reasonableness of rates, the same principle applies here.

2. MVNO Rates. The situation is almost as bad when we look at MVNO rates.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[illegible]

19

rate is on the high side of reasonable since it involves a margin.

B. Unreasonable Discrimination in Rates

addition, Verizon charges [REDACTED]

³⁴ Posner Affidavit at Exhibit J of Amended Complaint.

³⁵ *Id.* at p.3 and Attachment to Exhibit.

³⁶ See, e.g. *In the Matter of Connect America Fund, High Cost Universal Service Support*, 60 Comm. Reg. 178 (2014) ¶¶ 106-7.

³⁷ VZW's Response to NTCH's Interrogatories, Exhibit A, incorporated into the instant record by agreement of the parties (Notice of Formal Complaint, Enforcement Bureau, July 15, 2015).

38 *Id.*

From a service-provision perspective, MVNOs are functionally the same as roaming partners.⁴¹ An MVNO arrangement is one where a firm buys wireless services from a facilities-based carrier with the intent of reselling it to the public. The reason why such arrangements are relevant here is that the processing of calls or data usage by MVNO customers is functionally very similar to the processing of roaming calls. While there are minor differences in actual implementation due to the way roaming calls are cleared and billed through a clearing house (in some but not all roaming agreements), the process basically involves allowing another entity's traffic to be carried over the facilities-based carrier's existing network without any of the costs to the facilities-based carrier associated with advertising for, signing up, billing, providing customer service to, or otherwise establishing or maintaining the relationship with, an end user.⁴² Naked minutes and gigabytes are delivered.

A nationwide MVNO arrangement is therefore effectively a nationwide roaming agreement with no home area and no benefit to the economy or competition that comes from building and operating a home network.

While Verizon has argued

³⁹ *Id.* at p. 2.

⁴⁰ *Id.*

⁴¹ See Amended Complaint ¶¶ 28-30.

⁴² Beierschmitt Complaint Declaration at p. 6

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[REDACTED]⁴³ Verizon has identified no cost or other factors which would justify a different rate between an MVNO and a roaming partner. The Commission has expressly held that MVNO rates are relevant when analyzing roaming rates because they are such similar services.⁴⁴

There is no cognizable basis for justifying the difference in rates charged to different carriers. While Verizon's discovery responses indicate that some of the carriers

[REDACTED]
[REDACTED] GB EVDO data, are not offered exclusively [REDACTED].⁴⁵ Similarly, Verizon has provided [REDACTED]

[REDACTED].⁴⁶

Once a Section 202 complainant establishes that a carrier is charging discriminatory rates, which the record here clearly shows, the burden is on the carrier to justify the discrimination in price.⁴⁷ Verizon has steadfastly refused to offer any reason for the difference in these rates, meaning they are per se unreasonably discriminatory and commercially unreasonable.

⁴³ See VZW Response to NTCH's Supplemental Interrogatories, August 17, 2015, incorporated into the instant record.

⁴⁴ *T-Mobile Order*.

⁴⁵ VZW's Response to Flat's Interrogatories, Exhibit A incorporated into the instant record by agreement of the parties (Notice of Formal Complaint, Enforcement Bureau, July 15, 2015).

⁴⁶ *Id.*

⁴⁷ See, e.g. *MCI Telecom. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990) ("the carrier offering [the discriminatory prices] has the burden of justifying the price disparity as reasonable"); *In the Matter of William G. Bowles v. United Telephone Company of Missouri*, 12 FCC Rcd 9840, 9852 (1997) ("Once the like services and discrimination are established, the burden shifts to the defendant carrier to show that the discrimination is not unreasonable.").

[REDACTED]
[REDACTED]
[REDACTED], and no justification has been
presented for this discrimination.⁴⁸ [REDACTED]
[REDACTED]
[REDACTED],

again with no basis for the discrimination.⁴⁹ Accordingly, the offer made to Flat is
unreasonably discriminatory. Flat should be charged no more than the lowest rate
charged by Verizon to any other carrier or MVNO for each service category.

B. Data Roaming

Data roaming has become a significantly more important component in wireless
communications than when the cellular service was first introduced. Consumers now
expect more than just voice telephony from their cell phone service provider – they
expect internet access, multi-media messaging, and other services that require non-voice
data service both when at home and when roaming.

Flat is seeking a data roaming agreement for services that it itself provides in its
home markets and that are fully technically compatible with Verizon's technical system.
Provision of data roaming to Flat would not impose any additional costs on Verizon to
achieve technical compatibility.

⁴⁸ VZW's Response to Flat's Interrogatories, Exhibit A incorporated into the instant
record by agreement of the parties (Notice of Formal Complaint, Enforcement Bureau,
July 15, 2015).

⁴⁹ *Id.*

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The *Data Roaming Order* requires a review of the applicable factors outlined there.⁵⁰ The *T-Mobile Order* adds retail rates and wholesale rates as factors to consider in assessing reasonableness. It has already been established above that data roaming rate offered to Flat by Verizon is between [REDACTED] than the comparable rate it offers its retail customers and wholesale customers. The rate is also at least [REDACTED] [REDACTED] than its cost of providing data roaming. The offered rate bears no relationship to Verizon's actual costs and is so prohibitively high as to effectively preclude its roaming partners from being able to offer data roaming to their customers when roaming on the Verizon system. These factors are so compelling in evaluating the reasonableness of the rate that the other criteria pale in comparison. Nevertheless, let us examine the other factors cited by the Commission:

- *Whether Verizon has responded to the request for negotiation, whether it has engaged in a persistent pattern of stonewalling behavior, and the length of time since the initial request.* Verizon has not stonewalled.
- *Whether the terms and conditions offered by Verizon are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement.* The terms and conditions offered by Verizon are indeed so unreasonable. In today's marketplace, it is not practically feasible for carriers to pass through roaming charges incurred by customers when they roam, as was done in the early years of cellular service. When roaming charges are excessive, a customer's home carrier cannot afford to pay those charges because they would almost immediately exceed the amount the customer is paying the home carrier. Charging an excessively high roaming rate is therefore the practical equivalent of offering no roaming at all. That is why the current Verizon rate of [REDACTED] is not remotely sustainable by any carrier who is charging its own customers reasonable rates for service – rates akin to those charged by Verizon to its own customers. The home carrier must therefore

⁵⁰ *Data Roaming Order* at ¶ 86.

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block its customers' access to high-priced roaming carriers, leaving the customer with the choice of no service at all, and spotty service from an alternative CDMA carrier, or the cumbersome and commercially infeasible process of manually setting up a roaming call with Verizon.

- *Whether the parties have any roaming arrangements with each other, including roaming for interconnected services such as voice, and the terms of such arrangements.* The parties do have a roaming agreement which specifies rates

[REDACTED]

The existing rates are so excessive that Flat cannot permit its customers to roam at that rate because the roaming fee would grossly be excessive relative to Flat's flat rate fee structure.

- *Whether the providers involved have had previous data roaming arrangements with similar terms.* The current roaming agreement between the parties does not cover data roaming.
- *The level of competitive harm in a given market and the benefits to consumers.* The competitive harm to Flat has been crippling. Not only must it compete against MVNOs [REDACTED], but its own customers are hampered in their ability to have ubiquitous service because they have no access to the Verizon network to roam on.
- *The extent and nature of providers' build-out.* Flat has built out an extensive network of facilities in west Texas, New Mexico and the California/Arizona border. Flat has explained that unless it can obtain a reasonable roaming rate with Verizon, it cannot offer a viable service in its home markets. It has therefore delayed further commercial build-out of its facilities pending FCC action to compel reasonable rates. This approach is confirmed by the exit of Cricket and MetroPCS as independent players from the CDMA marketplace because they could not get reasonable roaming rates.
- *Significant economic factors, such as whether building another network in the geographic area may be economically infeasible or unrealistic, and the impact of any "head-start" advantages.* Flat plans to extend the build out of facilities in its

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licensed territories once this case is satisfactorily resolved.⁵¹ The delay in the expansion of a low cost competitor to Verizon in these markets where Flat and Verizon would compete head-to-head works directly to Verizon's advantage. It is therefore critical that this case be resolved soon to ameliorate the head-start advantages Verizon already enjoys.

- *Whether the requesting provider is seeking data roaming for an area where it is already providing facilities-based service.* Flat is not seeking such roaming.
- *The impact of the terms and conditions on the incentives for either provider to invest in facilities and coverage, services, and service quality.* Flat indicated that it can deliver mobile services at a lower cost to customers by building out its own facilities rather than by roaming on Verizon, even at the roaming rates sought in this complaint.⁵² The availability of reasonable roaming therefore does not disincite Flat to build out such facilities in its own markets. However, the unavailability of reasonable roaming rates in areas *outside* Flat's home markets makes it impossible for Flat to offer a competitive product in its home territories.
- *Whether there are other options for securing a data roaming arrangement in the areas subject to negotiations and whether alternative data roaming partners are available.* As indicated above, Sprint is the only other nationwide CDMA carrier, and its network is only half as broad and not as deep as Verizon's.⁵³ In many areas, there is simply no alternative to Verizon as a CDMA roaming partner.
- *Events or circumstances beyond either provider's control that impact either the provision of data roaming or the need for data roaming in the proposed area(s) of coverage.* The consolidation of carriers into the big four nationwide providers has severely reduced roaming options for smaller carriers like Flat.
- *The propagation characteristics of the spectrum licensed to the providers.* Not applicable. However, we note that virtually all of the sub-1 GHz spectrum which

⁵¹ Beierschmitt Declaration attached to Consolidated Answer.

⁵² Beierschmitt Complaint Declaration.

⁵³ *Supra*, p. 12.

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most efficiently covers rural areas is licensed to Verizon or AT&T, with virtually none held by Sprint, the other major CDMA carrier.

- *Whether Verizon's decision not to offer a data roaming arrangement is reasonably based on the fact that the providers are not technologically compatible.* Not applicable. Such compatibility is presumed.
- *Whether Verizon's decision not to enter into a roaming arrangement is reasonably based on the fact that roaming is not technically feasible for the service for which it is requested.* Not applicable. Technical compatibility is presumed.
- *Whether Verizon's decision not to enter into a roaming arrangement is reasonably based on the fact that changes to the host network necessary to accommodate the request are not economically reasonable.* Not applicable. Technical changes have not been requested.
- *Whether Verizon's decision not to make a roaming arrangement effective was reasonably based on the fact that the requesting provider's provision of mobile data service to its own subscribers has not been done with a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam.* Not applicable. Data roaming will only be sought for services available to Flat's own subscribers.
- *Other special or extenuating circumstances.* See restraint of trade discussion below.

C. Restraint of Trade

As with excessive voice roaming charges, excessive data roaming rates stifle competition both by crippling Verizon's competitors' ability to offer consumers service that is realistically available when they are outside their home markets and by enabling MVNOs to effectively drive lower cost carriers from the market. It has already been established that Verizon holds a dominant position in the CDMA roaming market because of its unique coverage. This dominance of the market is effectively confirmed

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by the fact that it has been able to charge roaming rates [REDACTED] higher than its costs (“monopoly rents”, in economic parlance), a circumstance that under economic principles cannot occur over the long term unless there is a lack of effective alternatives.⁵⁴

This misuse of Verizon’s monopoly power is reflected in two ways. First, a local or regional mobile services provider is in the unenviable position of competing with the national carriers for market share. Despite the imbalance of resources and advertising channels, many local and regional carriers are nevertheless able to survive by providing localized service, better rates, better customer service, or other methods that make their individualized products superior to the majors. Flat’s approach has been to target low income/bad credit customers who had traditionally been ignored by the major carriers. This is a viable business model because it fills a need unmet by the big companies. However, as Flat, NTCH, Cricket, and MetroPCS all have found, the model requires access to reasonable roaming rates to be successful. No matter how superior the quality of the service offered by a small carrier in its own service area, customers demand that they be able to roam when they are *outside* the service area. If Flat cannot offer its customers that ability to roam outside the home market, it cannot attract or retain customers in the long run.

This has been precisely the problem encountered by Flat and other carriers. Without a reasonable roaming rate from Verizon, Flat cannot offer or deliver a viable service product locally. In virtually every market in which Flat operates or plans to operate, Verizon is a competitor. Hence, Verizon is able to cripple its localized

⁵⁴ See, e.g., *Qwest Corp. v. Iowa State Bd. of Tax Review*, 829 N.W.2d 550, 563 (Iowa, 2013).

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competitor from gaining customers – even though the competitor may have superior coverage and service locally – simply by denying that competitor access to its roaming network. It uses its power in the roaming market where there is no competition to restrain competition in the local market where there is competition. This is a classic restraint of trade.⁵⁵ This strategy has driven numerous carriers from the market over the last five years and has directly deterred Flat from being able to launch or extend commercial service in many of the markets where it offers competitive service.⁵⁶

Verizon's strategy in this regard is conceded in the Declaration of Hal Singer, which was permitted to be submitted as an expert declaration after the time for filing factual submissions had closed. Despite its untimely submission, Dr. Singer's declaration is telling in one very significant respect. He outlines a theory of "opportunity costs" which he uses to justify Verizon's high but otherwise unjustifiable roaming rates.⁵⁷ He explains matter-of-factly that it makes sense for Verizon to encourage roaming where Verizon does not suffer any adverse consequences to its competitive position. However, Dr. Singer goes on to opine, Verizon would incur an "opportunity cost" if it permitted companies with whom it competes in its home markets to effectively expand their footprint by roaming on Verizon's system. This is because customers in the home market could be induced by the availability of roaming to the roaming carrier to switch to that other carrier, thus causing the host carrier's revenue streams to be "threatened." This situation where a roaming agreement would not be "voluntarily" entered into by the dominant carrier is contrasted with the situation where there is no competition between

⁵⁵ 15 U.S.C. § 2. *See, also McQuillan*, 506 U.S. at 456; *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966).

⁵⁶ *See* Beierschmitt Complaint Declaration.

⁵⁷ Singer Declaration at pp. 4-6.

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the carriers and therefore a voluntary roaming agreement can be reached with a mutually profitable split of the roaming revenue.

Flat must applaud Dr. Singer for so forthrightly laying out the economic rationale for a monopolist's use of the monopoly power that it has in one market (CDMA roaming) to extinguish competition in a competitive market (the local markets where Verizon and Flat compete). He expertly confirms just what Flat has asserted all along – that Verizon charges high roaming rates not just because it can, but because it is enhancing its own competitive position by crushing Flat's ability to compete head to head where both firms provide facilities-based services. If the roaming rate is set high enough, as Verizon has done here, the competitor cannot feasibly offer any service access to its customers in large areas of the United States. This is unlawful in numerous respects:

a. The Commission's rules and policies have always required roaming to be provided on reasonable terms. There is no exception in the rules for when a carrier might be hurt competitively by offering roaming to a competitor.

b. It is a violation of the anti-trust laws. A violation of Section 2 of the Sherman Act is made out under the doctrine of "monopoly leveraging" when a firm with monopoly power in one market (here CDMA roaming) uses that power to gain a competitive advantage over a competitor in another distinct market (here home market service) and causes injury by that conduct.⁵⁸ The Supreme Court has added that the conduct in the second market must monopolize or dangerously threaten to monopolize the second market.⁵⁹ The exit of CDMA carriers like Allied, Cricket, MetroPCS and numerous other smaller carriers from that market, along with the departure of potential

⁵⁸ *Virgin Airways Ltd.*, 257 F. 3d 256.

⁵⁹ *McQuillan*, 506 U.S. at 459.

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competitor SpectrumCo a few years ago, all complaining that they could not go forward without reasonable roaming rates, underscore the reality that Verizon's roaming rate policies are working to eradicate competition in the home markets where it makes most of its profit.

c. Even if not an outright Sherman Act violation, it is plainly a restraint of trade which the Commission has declared to be *per se* commercially unreasonable.⁶⁰

d. It violates one of the most important indicators of commercial reasonableness in the *Data Roaming Order*: Whether the terms and conditions offered by Verizon are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement.

Simply stated, Verizon's now transparently enunciated policy of using excessive roaming rates to squelch competition in the non-roaming market is unlawful. At a minimum, rates set for this purpose at these levels cannot possibly be found to be "just and reasonable."

Dr. Singer further opines at pp. 6-8 of his Declaration that "market-determined" rates might not be available in certain circumstances which would justify use of "reference points" (presumably the reference points alluded to in the *T-Mobile Order*) to inform commercially reasonable rates. One such circumstance is when a database of rates accepted by others is available for comparison. Using Verizon's roaming rate chart, Dr. Singer concludes, as did the Commission in the *NTCH Order*, that those rates establish a basis for measuring reasonableness. However, Dr. Singer goes on to note another circumstance where rates are *not* "market-determined" which effectively undercuts his

⁶⁰ *Data Roaming Order* at ¶ 85.

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first conclusion. This occurs when a carrier like Verizon has a “must-have” input -- what he describes as a situation where the alternative service providers are “perceived by the customers to be so inferior to Verizon’s network that substitution [is] impossible.”⁶¹ This is, of course precisely the situation presented here.

Flat demonstrated without contradiction that in large areas where its customers roam, Verizon is the only available CDMA service provider.⁶² As noted above, Sprint, the only other nationwide CDMA service provider, has less than half of the coverage area of Verizon, leaving more than 1.2 million square miles served by Verizon but not by Sprint.⁶³ It is therefore no wonder that Flat (and many other local and regional carriers) have complained for years that they need access to Verizon in order to have any roaming service at all. Once the Commission appreciates the “must-have” nature of access to Verizon for roaming, the ability of Verizon to set rates far in excess of commercially reasonable levels is acknowledged by Dr. Singer himself. And, because these rates are in no sense market-driven, the fact that many carriers have reluctantly accepted Verizon’s rates is essentially meaningless from a reasonableness standpoint. Carriers like Flat and NTCH obviously have roaming deals with Verizon which they have consistently claimed are grossly excessive. Other carriers have vigorously lodged similar concerns in the T-Mobile proceeding. Yet Verizon presumably points to these roaming agreements as “evidence” that all of the rates offered are reasonable because all of the carriers have accepted them. The fact is that many like Flat have accepted them under exactly the terms that Dr. Singer decries: out of “must-have” commercial necessity.

⁶¹ Singer Declaration at p. 8.

⁶² Beierschmitt Declaration at p.2.

⁶³ 2016 Competition Report at Table VI.A.iii.

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The second way excessive roaming rates restrain trade is by allowing MVNOs [REDACTED] to undercut independent competing carriers like Flat. As shown above, [REDACTED]
[REDACTED]. This permits [REDACTED] to offer services [REDACTED] something which Flat cannot offer its own customers. [REDACTED] and Flat compete directly for the low income/bad credit customer base. By making it impossible for Flat to compete against such an MVNO, Verizon can indirectly drive – and has driven – carriers out of the marketplace. This is called “predatory pricing by proxy” because Verizon effectively has the MVNO do the dirty work of wiping out competition while Verizon stands above the fray. When all such competition is eliminated, Verizon can either raise the rates it charges the MVNO or simply pull the plug on it completely. The result is that a source of real competition to Verizon is destroyed. Again, this is a classic antitrust violation.⁶⁴

The Commission has flatly declared that data roaming rates which restrain trade are not reasonable. As long as Verizon is allowed to charge excessive roaming rates to its competitors, real competition will be crippled to the severe detriment of consumers who are looking for alternatives to the overpriced, overcomplicated and over-constraining service offerings of Verizon. The Commission should recognize Verizon’s practices for what they are and declare them unreasonable restraints of trade.

IV. Conclusions

The voice rate offered by Verizon to Flat is unjust and unreasonable. It exceeds its cost of providing service by a wide margin, offering a rate of return far in excess of

⁶⁴ *Supra*, n. 17.

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the 8.75%. It also exceeds relevant retail rate benchmarks by a wide margin, confirming that Verizon's costs must be well below the rate offered to Flat. It also exceeds the rate offered to an MVNO by a wide margin. Even without establishing the actual costs that Verizon incurs in providing voice and data roaming service, it is clear that the particular rates offered here exceed any level that might be deemed reasonable by reference to Verizon's charges for the same services to other service users. The Commission should therefore (i) declare any roaming rate charged to Flat by Verizon above the rate requested by Flat to be unjust and unreasonable under Title II of the Communications Act and (ii) it should open a full investigation of the cost structure of Verizon for roaming to ensure that a true cost-based rate is being charged to all of Verizon's roaming partners.

The voice and data roaming rates charged by Verizon are also unreasonable because they are intended to stifle competition by leveraging its dominance of the CDMA market to prevent competitors from offering viable roaming opportunities to their customers. Conduct that unreasonably restrains trade is not reasonable as a matter of law. *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers* 26 F.C.C. Rcd. 5411 at 85 (2011); *Further Forbearance*, 13 FCC Rcd 16857 at 14 (1998).

The roaming rates offered by VZW are unjustly and unreasonably discriminatory because there is no technical or economic reason why the rate charged to Flat should differ substantially from the rates offered to other carriers or to its own customers. Verizon has offered no justification for offering different rates to different carriers for identical services. Verizon may therefore lawfully charge Flat no more than the lowest

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roaming rate it charges another carrier or MVNO [REDACTED]

[REDACTED].⁶⁵

As requested in the Complaint, the Commission must require that roaming and MVNO contracts be made public in order to forestall unreasonable discrimination.⁶⁶ In addition to furthering the principles of transparency which the Commission has recently recommitted itself to in the *Net Neutrality Order*⁶⁷, such a ruling is crucial to ensuring that competitors, the public, and the Commission itself can verify that the requirements of the Act and the Rules are being complied with.

Finally, the data roaming rate offered by Verizon is not commercially reasonable under the totality of the circumstances. As with the voice rate offered by Verizon, the data rate provides a return of about [REDACTED] as measured by offerings to other carriers, to MVNOs, and to its own retail customers. Since a reasonable rate of return these days has been set by the Commission at 8.75%, there is no rational basis on which this rate of return can be found to be reasonable. The factors identified in the *Data Roaming Order* without exception support a finding that the roaming rate has no commercially reasonable basis.

More than a year has gone by since the instant Complaint was filed. The Communications Act requires complaints of this nature to be resolved in no more than five (5) months. 47 U.S.C. § 208(b)(1). Every month and year that goes by without relief

⁶⁵ [REDACTED]

[REDACTED] See Verizon's Response to Flat's Interrogatories, Exhibit A.

⁶⁶ Complaint ¶¶ 34-37.

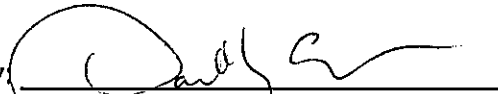
⁶⁷ *Report and Order on Remand, Declaratory Ruling, and Order*, "Protecting and Promoting the Open Internet" 30 FCC Rcd 14162 at ¶ 23 ("Net Neutrality Order").

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from the grossly excessive rates charged by Verizon gives Verizon a competitive advantage and directly undercuts Flat's ability to compete. Flat therefore requests prompt action by the Commission to grant the Complaint and order the requested relief.

Respectfully submitted,

Flat Wireless, LLC.

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September 30, 2016

CERTIFICATE OF SERVICE

I, Jonathan Markman, do certify that I sent Confidential copies of the foregoing Initial Brief of Flat Wireless, LLC, on this 30th day of September, 2016, addressed to the following via email:

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